Supreme Court, U.S.
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No. 08-497

In The
Supreme Court of the United States

AMERISOURCE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a taking compensable under the Fifth Amendment for the Government to seize (and not return) an innocent third party's property for use as evidence in a criminal prosecution, if the property is not itself contraband, is not the fruits of criminal activity, and has not been used in criminal activity.

PARTIES TO THE PROCEEDING

Petitioner is a wholly owned subsidiary of AmerisourceBergen, a publicly traded company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

No. 08-

AMERISOURCE CORPORATION, PETITIONER

V.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AmeriSource Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc (App., *infra*, 43a-44a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 525 F.3d 1149. The opinion of the United States Court of Federal Claims (App., *infra*, 19a-42a) is reported at 75 Fed. Cl. 743.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2008. App., *infra*, 45a. The court denied a timely petition for rehearing on July 21, 2008. App., *infra*, 43a-44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

1. This case arises out of an August 2000 shipment of Viagra, Xenical, and Propecia from petitioner AmeriSource to Norfolk Pharmacy ("Norfolk"). The value of the shipment was approximately $150,000. Under the terms of the contract between petitioner and Norfolk, petitioner retained title to (and a security interest in) the pharmaceuticals until Norfolk paid for them. Unbeknownst to petitioner, a Federal grand jury in Alabama recently had indicted the principals of Norfolk (Anita Yates and Anton Pusztai) on charges of conspiracy, unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering. On August 7, 2000, the Government executed a

search warrant at a Norfolk facility in West Virginia, seizing a large quantity of pharmaceuticals, including the shipment from petitioner. Norfolk had not yet paid for the shipment of pharmaceuticals from petitioner. Norfolk subsequently went out of business. It never paid petitioner for the pharmaceuticals. App., *infra*, 3a-4a, 21a, 50a-51a.

2. In October of 2000, petitioner filed a motion in the United States District Court for the Middle District of Alabama, where the criminal proceedings against Yates and Pusztai were pending. In that motion, petitioner sought the return of the pharmaceuticals seized by the Government under Federal Rule of Criminal Procedure 41, explaining that the pharmaceuticals would expire in 2003 and become worthless at that time. The Government opposed the motion, contending that it needed the pharmaceuticals as evidence against Yates and Pusztai, and explaining to the court that the trial would take place before the pharmaceuticals expired. Eventually, in February of 2002, the district court denied petitioner's motion and allowed the Government to retain the pharmaceuticals. App., *infra*, 4a-6a, 21a-24a.

In June of 2002, the court convicted Yates and Pusztai. At the trial, the Government did not use any of the pharmaceuticals seized from petitioner's shipment. During the pendency of an appeal by Yates and Pusztai, the Government retained the pharmaceuticals for use in any retrial that might be necessary. Ultimately, after the pharmaceuticals had expired, the Eleventh Circuit sitting *en banc*

overturned the convictions, remanding the cases for a new trial. *United States v. Yates*, 438 F.3d 1307 (2006) (holding that testimony by video teleconference was inconsistent with the Confrontation Clause). Shortly after that decision, the defendants Yates and Pusztai agreed to plead guilty. They have been convicted and sentenced. App., *infra*, 4a, 24a-25a.

3. On April 8, 2004, petitioner filed a complaint in the Court of Federal Claims, seeking compensation for the loss of the expired pharmaceuticals under the Tucker Act, 28 U.S.C. § 1491. C.A. App. A22-A34.[1] The Government moved to dismiss the complaint, contending that the police power granted the Government a free right, unconstrained by the Takings Clause, to take and retain property for potential use as evidence in criminal proceedings. C.A. App. A35-A45. Relying on a line of its own decisions indicating that petitioner's claim was meritorious, the court denied the Government's motion to dismiss, explaining that "this Court has entertained takings claims" in similar situations in the past. C.A. App. A127-A132 (citing, *inter alia*, *Interstate Cigar Co. v. United States*, 32 Fed. Cl. 66 (1994)).

4. Thereafter, the trial court entertained a second motion to dismiss. C.A. App. A133-A161. Responding to that motion, the court acknowledged that the Government "provided little authority on the Government's taking of property strictly for its

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[1] "C.A. App." refers to the appendix that petitioner filed in the court of appeals.

evidentiary value," *see* App., *infra*, 38a, and that decisions of the Eighth and Tenth Circuits supported petitioner's claim, App., *infra*, 37a (citing *United States v. Hall*, 269 F.3d 940 (8th Cir. 2001); *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973)). Nevertheless, it concluded that the Federal Circuit's decision in *Acadia Technology, Inc. v. United States*, 458 F.3d 1327 (2006), compelled dismissal of the complaint. The court explained:

> We, therefore, conclude that the police power rationale does apply in this context just as it would in the long line of forfeiture cases. The ability of federal prosecutors to deprive property owners of certain items in order to secure justice and a fair trial for a criminal defendant is a legitimate and traditionally accepted exercise of the police power. Accordingly, it is by definition not a compensable taking.

App., *infra*, 41a (citing *Acadia*, 458 F.3d at 1331).

5. The court of appeals affirmed. App., *infra*, 1a-18a. The court noted that "[petitioner's] argument might have considerable force" "[i]f we confined our reasoning to a literal reading of the text." App., *infra*, 8a. The court, however, discerned "a narrower meaning" for the Takings Clause in the prior decisions of this Court and the court of appeals. *Ibid.* Specifically, the court identified a categorical exemption from the Takings Clause for actions taken under the police power: "Property seized and

retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." App., *infra*, 10a. The court relied primarily on its earlier decision in *Acadia*. *See* App., *infra*, 10a-11a (discussing *Acadia*). But it also drew support for its analysis from this Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996): "*Bennis* suggests that so long as the government's exercise of authority was pursuant to some power other than eminent domain, then the plaintiff has failed to state a claim for compensation under the Fifth Amendment." App., *infra*, 12a.

The court recognized the incongruity of its holding, but concluded that *Bennis* and *Acadia* compelled the result:

> It is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all. But the war memorials only a short distance from the Federal Circuit courthouse remind us that individuals have from time to time paid a dearer price for liberties we all enjoy. While [petitioner's] core theory is a sensible policy argument, it is just that, a policy argument that has been considered and discarded in the relevant precedents. Someday Congress may well pass a law providing compensation for owners in [petitioner's] position. In the meantime, this case stands as a

> "reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." *Bennis*, 516 U.S. at 454 (Thomas, J., concurring).

App., *infra*, 18a.

6. Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition and suggestion on July 21, 2008. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with the text of the Takings Clause, with the historical understanding at the time of its adoption, and with this Court's interpretation of it. Although those sources unite in requiring compensation for physical seizures, the court below adopted a sweeping exception from the Clause for all actions justified under the police power – even physical seizures. That categorical exception ignores this Court's regulatory takings jurisprudence and fundamentally misapprehends the relation between the Just Compensation requirement and the police power.

Bennis does not support, much less compel, such a result. *Bennis* involved property used in the commission of an offense, to which the Government acquired title by forfeiture. In contrast, the property here was confiscated from an innocent third party, without forfeiture, for use merely as evidence. The holding of the court of appeals that the Government

can seize such property without compensation is, as the courts below recognized, unprecedented.

Because of the exclusive jurisdiction of the court of appeals over cases involving the Tucker Act, 28 U.S.C. § 1491, the decision has national reach for cases seeking compensation from the United States. The analysis of the court below conflicts with the analysis used by the regional courts of appeals in analogous cases. Only this Court can ensure that the prosecutorial vigor of the Executive Branch is subject to appropriate scrutiny under the Takings Clause.

I. The Takings Clause Requires Compensation When the Government Confiscates Lawful Property of an Innocent Third Party for Use as Evidence in a Criminal Prosecution.

1. The court of appeals candidly acknowledged (App., *infra*, 8a) that "a literal reading of the text" of the Constitution supports petitioner's claim. Petitioner indisputably has private property – an interest in the pharmaceuticals for which it was never paid.[2] The Government took the property – it forcibly seized exclusive physical possession of the

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[2] Paragraph 12 of the invoice provides that until full payment was received, petitioner retained both a security interest in the goods and title to the goods. *See* App., *infra*, 50a-51a. That interest indisputably rises to the level of "property" protected by the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 45-46 (1960) (requiring compensation for a taking of materialmen's liens); *United States v. Security Industrial Bank*, 459 U.S. 70, 77-78 (1982) (taking of security interests in household goods).

property and retained it until all value was lost when the pharmaceuticals expired. The taking was for a quintessential public use – as evidence in a criminal prosecution. And petitioner has received no compensation, just or otherwise.

The court of appeals reconciled its conclusion with the Clause's text by the remarkable contention that seizures under the "police power" are by definition not for a "public use." App. *infra*, 10a. Putting to one side the difficulty of reconciling that analysis with the Public Use Clause of the Fifth Amendment,[3] this Court emphatically has recognized that the broadest deference to the police power cannot justify physical seizures without compensation:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires property for a

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[3] "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the Taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); *see Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)); *id.* at 491 (Kennedy, J., concurring); *id.* at 496 (O'Connor, J., dissenting); *id.* at 506-08 (Thomas, J., dissenting); *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 22 (1985) (discussing the lengthy historical provenance of the public use requirement).

> public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. * * * Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 321-22 (2002). The cavalier disregard of the text of the Constitution warrants review by this Court.

2. Petitioner's claim falls within the core of the original intent of the drafters of the Clause. Scholars and Justices have debated the extent to which the original conception of the Clause required compensation for purely regulatory actions, but all agree that the Clause was intended to require compensation for physical seizures. Whether the best reading of the history limits the compensation requirement to physical seizures,[4] or extends it more broadly to require compensation whenever

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[4] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055-61 (1992) (Blackmun, J., dissenting); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the Clause should be limited to physical seizures); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 470 (2002) ("[T]he Court has departed from the original understanding in concluding that governmental regulation of permissible land uses can constitute a 'taking' in the absence of any physical seizure.").

regulations are not adequately related to "harms" emanating from the property,[5] compensation is due here.

The forcible confiscation of the property here is precisely the type of conduct at which the drafters directed the Clause. For example, when Massachusetts and Vermont first constitutionalized the just compensation requirement after the Declaration of Independence, the obligation to compensate for "physical takings" was "absolute."[6] When the Bill of Rights was ratified, contemporaneous observers like John Jay and St. George Tucker explained that the Takings Clause was included to limit the forced impressment of

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[5] *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988) (arguing that the history supports application of the Clause to regulatory takings unrelated to "harm" caused by the regulated property); *Pennell v. City of San Jose*, 485 U.S. 1, 19-20 (1988) (Scalia, J., concurring in part and dissenting in part) (explaining that "[t]raditional land-use regulation [is constitutional] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly."); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112-25 (1985) (justifying extension of the Takings Clause beyond the nuisance rationale).

[6] *See* Treanor, *supra*, 95 COLUM. L. REV. at 826-34; William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 702-08 (1985).

supplies by the military.[7] Similarly, the draft of the Clause that Madison proposed to Congress provided that "[n]o person shall be * * * obliged to relinquish his property * * * without a just compensation."[8] An interpretation of the Clause that absolves the Government from compensation in this case removes the specific application for which the historical understanding is clearest: a forcible seizure of tangible property.

3. The court of appeals articulated a stark dichotomy between actions taken under the police power (for which compensation is not due) and actions taken under the eminent domain power (for which compensation is due). That remarkable framework vitiates decades of this Court's jurisprudence. The Supreme Court's longstanding view that the Fifth Amendment requires compensation for some types of aggressive regulatory activity derives from Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Court in that case invalidated a statute that limited the ability of mining companies

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[7] Treanor, *supra*, 95 COLUM. L. REV. at 835-36 (discussing the views of St. George Tucker published in 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (St. George Tucker ed. 1803)); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993) (discussing views of St. George Tucker and John Jay).

[8] James Madison, Amendments to the Constitution (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson et al. eds. 1979); *see* Treanor, *supra*, 94 YALE L.J. at 711.

to exercise mineral rights in residential areas. Justice Holmes acknowledged the "public interest" that supported the statute (260 U.S. at 413-14), but nevertheless concluded that the Takings Clause required compensation:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss * * * should fall.

Id. at 415-16.

The Court has struggled to articulate clear rules for determining precisely *when* regulatory activity requires compensation under the Takings Clause. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 n.17 (1985). Still, the Court always has emphasized the importance of physical occupation of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (explaining that cases "uniformly have found a taking" for "permanent physical occupation of property" because it "is perhaps the most serious form of invasion of an

owner's property rights").[9] This makes sense because "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights," *Tahoe-Sierra Preservation Council, supra,* 535 U.S. at 324. Indeed, the Court's regulatory jurisprudence is an exception to the general rule not (as the court of appeals concluded) because it identifies cases in which physical occupations are not compensable, but rather because it identifies cases in which compensation is due for regulations that do not involve physical occupation. When intrusions involve physical occupation, the Court has held firm to this guiding principle: "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992).[10]

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[9] *See also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

[10] It is easy to imagine takings for evidentiary purposes that are temporary or do not deprive the owner of the full value of the property, and it well may be that resolution of such cases would involve more fact-specific analysis. *Compare, e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 317-320 (1987). The facts of this case and the analysis of the court of appeals, however, present the problem in the clearest possible context, in which the government action deprived petitioner of all of its interest in the property.

4. The erroneous analysis of the court of appeals rests on this Court's ruling in *Bennis v. Michigan*, 516 U.S. 442 (1996). The court of appeals interpreted *Bennis* as a foundational precedent evidencing a general principle that permits physical seizure without compensation whenever the government can justify its action by reference to the "police" power. Not surprisingly, given the discussion above, the Court's opinion in *Bennis* provides not a word of support for such a reading. The bulk of the Court's opinion in *Bennis* addresses the contention that the forfeiture at issue there violated the Fourteenth Amendment because it extinguished Bennis's interest in a car despite her lack of knowledge of her husband's criminal use of the car. 516 U.S. at 446-52. The Court's analysis of the Takings Clause appears in a single paragraph, which explains:

> [I]f the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

516 U.S. at 452.

That analysis does not excuse compensation in this case, because the government did not forfeit

petitioner's property. The Government here, unlike the respondent in *Bennis*, never lawfully acquired title to the property. Rather, it simply took forcible possession of it. Because the Government in this case did not gain title to the property through its forfeiture power, neither *Bennis* nor the distinct constitutional justifications for the forfeiture power support the Government's action.[11] The court of appeals' loose extension of *Bennis* ignores the factual underpinnings and legal reasoning apparent from this Court's opinion.

The unbounded extension of *Bennis* is particularly dubious given the clarity with which the separate opinions in that case emphasized the narrowness of the Court's decision. Justice Thomas explained in his concurrence that limits on forfeitures "become especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime." *Bennis*, 516 U.S. at 455 (Thomas, J., concurring). He concluded that the "appropriate" response is "to apply those limits rather strictly, adhering to historical standards for determining whether specific property is an 'instrumentality' of crime." *Id.* The circumstances that concerned him are presented here: the record provides no reason to "suspect [petitioner] of colluding in crime" and the property in

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[11] The Government has not claimed in this case that the property was subject to forfeiture. *Compare* 21 U.S.C. §§ 334 (authorizing a libel for condemnation of adulterated and misbranded pharmaceuticals), 853(a) (authorizing forfeiture of property that is proceeds of an offense or used to commit or facilitate the offense).

question was not an instrumentality of crime. The analysis of Justice Thomas's concurrence would bar either a forfeiture or an uncompensated taking for use as evidence.

Justices Ginsburg and Kennedy emphasized the importance of Bennis's claims of innocence: Because Justice Ginsburg doubted Bennis's innocence, she concurred in the judgment: "Michigan * * * has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment." *Bennis*, 516 U.S. at 458 (Ginsburg, J., concurring) (citation omitted). Justice Kennedy, by contrast, concluded that the irrelevance of innocence to the analysis of the Michigan court rendered its judgment insupportable. *Bennis*, 516 U.S. at 473 (Kennedy, J., dissenting). The court of appeals here, rejecting both of those approaches, interpreted *Bennis* as holding that innocence has no relevance to the constitutional inquiry. *See* App., *infra*, 12a ("The innocence of the property owner does not factor into the determination.").

Justice Stevens also dissented, concluding (for himself and for Justices Souter and Breyer) that *Bennis* itself went too far. As he explained, the Court repeatedly had rejected challenges to forfeiture schemes, "insist[ing] that expansive application of the law had not yet come to pass." *Bennis*, 516 U.S. at 462 (Stevens, J., dissenting). Justice Stevens noted the promise of the Court in earlier cases that it would stand ready to prevent extravagant uses of the forfeiture power: "'When such application shall be made,' we said, 'it will be time enough to pronounce upon it.'" *Id.* (quoting *J.W.*

Goldsmith, Jr. Grant Co. v. United States, 254 U.S. 505, 512 (1921)). In his view, *Bennis* presented an occasion for drawing a line: "That time has arrived." *Bennis*, 516 U.S. at 462 (Stevens, J., dissenting). Because this case presents a seizure in which the Government did not even attempt a forfeiture, it would under the analysis of Justice Stevens's dissent be even more plainly unacceptable than the forfeiture at issue in *Bennis*.

The concerns of the various Justices writing in *Bennis* about the ceaseless expansion of the Government's power to confiscate without compensation are particularly apt here. Whatever the merits of the debate regarding the forfeiture at issue in *Bennis*, there is no settled usage permitting the Government to confiscate property merely as evidence of criminal activity. Indeed, until *Warden v. Hayden*, 387 U.S. 294 (1967), the Court's view of the Fourth Amendment made such seizures unusual. The Court's decision to permit warrants for that purpose in *Hayden* only authorized those seizures. It did not validate them as wholly exempt from constitutional scrutiny.

5. Law enforcement is the quintessential public activity. The necessity of collective mechanisms to suppress harmful conduct is at the heart of the social contract that justifies a public monopoly on coercive force. *See* THOMAS HOBBES, LEVIATHAN ch. xvii (1651). Yet, no one would seriously suggest that the Government could commandeer the land or buildings in which this

Court sits.[12] Nor could the Government acquire the goods and services necessary to perform those functions without compensating the owners. The evidence the Government may wish to present in its prosecutions is no different. The cost of the criminal process is almost by definition a "public burde[n] which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[13]

Moreover, a system in which the Government is free to shift the costs of prosecution to innocent taxpayers is one in which the Government has no obligation to pursue law enforcement in a cost-effective way.[14] This case illustrates the point well.

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[12] *But cf.* App., *infra*, 18a (concluding that the Takings Clause contemplates that "one citizen or small group of citizens" could be forced "to bear alone the burden of the administration of a justice system that benefits us all").

[13] *Compare Pennell v. City of San Jose*, 485 U.S. 1, 19-20 (1988) (Scalia, J., concurring in part and dissenting in part) (explaining that "[t]raditional land-use regulation [is constitutional] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.").

[14] To the extent the historical materials suggest a specific motivation for the Takings Clause, concerns about arbitrary behavior by federal officials remote from the constraints of the democratic process were paramount. *See* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 291-92 (1988); AKHIL REED AMAR, THE BILL OF RIGHTS 79-80 (1998).

The Government confiscated hundreds of boxes of pharmaceuticals shipped by petitioner, and insisted that it needed to hold all of the pharmaceuticals for years, past the date on which they expired. Ultimately, however, the Government never used any of this material as evidence.

As we emphasized in our briefing to the court below, we do not suggest that the trial court should have reviewed the reasonableness of the Government's decision to retain the property, or that trial courts routinely should order the Government to release property held for potential use as evidence. Courts are not well-placed to engage in judicial second-guessing of those kinds of prosecutorial decisions. It is sensible, however, to obligate the Government to pay when it confiscates property from innocent third parties as mere evidence. That arrangement combines Executive discretion to articulate prosecutorial policy with a salutary incentive to act with reasonable consideration of the costs of implementing that policy. But the merits of such a compromise are beside the point here, because the Takings Clause has resolved the issue specifically: the Government's decision to confiscate the property of private individuals for public purposes is checked by its Constitutional obligation to pay just compensation.

When the Government confiscates property because the property owner has acted unlawfully or because the property has been used unlawfully, it may be fair to say that the owner should bear the burden of the Government action. But that justification is exhausted when the Government

confiscates licit property of an innocent third party for use merely as evidence of criminal activity.[15] In that situation, which this petition presents to the Court, the wholly public purposes make compensation obligatory.

II. The Gravity and Consequences of the Error Below Warrant the Attention of This Court.

The discussion above underscores the need for this Court to clarify the rationale of the decision in *Bennis*. The court of appeals read the decision as a general justification for the seizure and physical retention of property without compensation. Because the doctrinal approach of the court of appeals rests directly on its understanding of *Bennis*, there is no reasonable prospect that the court of appeals will resolve the problem. Only this Court can finally "debun[k] the myth that physical occupations occurring in the regulatory context are somehow different from physical occupations arising out of eminent domain," Kmiec, *supra*, 88 COLUM. L. REV. at 1657-58.

The decision has important ramifications for administration of the Federal justice system. Because the court of appeals has exclusive jurisdiction to review Takings claims against the

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[15] When evidence is confiscated from an innocent third party, it is particularly difficult to discern the "average reciprocity of advantage" that justifies deference to regulatory exactions in Takings analysis, *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (quoting *Pennsylvania Coal Co.*, *supra*, 260 U.S. at 415).

United States, the precise question presented to the court of appeals cannot arise in the other courts of appeals. Thus, the decision's categorical rejection of the claim here gives the Executive Branch a green light for aggressive exercise of prosecutorial authority throughout our Nation (and abroad). Because of the programmatic significance to the Executive Branch of decisions of the Federal Circuit, this Court frequently has reviewed decisions that set important policies on a national basis. *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *see Cardinal Chemical Co. v. Morton Int'l*, 508 U.S. 83, 89 (1993) (noting "special importance" of Federal Circuit decisions "to the entire Nation"). The experience of the past decade should give us pause about casual validation of a wholly unchecked investigatory process. Absent review by this Court, the Government need not worry about the possibility that other courts of appeals will reject the analysis of the Federal Circuit. It can be sure that the court below will review all challenges to the policy in question here.[16]

The exclusive jurisdiction of the court of appeals over Tucker Act claims also means that the regional courts of appeals do not have occasion to address the precise question presented to the Court. Those courts have, however, frequently faced claims seeking damages (often under Federal Rule of

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[16] Although the Little Tucker Act (28 U.S.C. § 1346(a)(2)), grants the regional district courts jurisdiction to hear Takings claims against the Government when the amount in controversy does not exceed $10,000, 28 U.S.C. § 1295(a)(2) routes appeals from those decisions to the Federal Circuit.

Criminal Procedure 41) based on the government's confiscation of property for use as evidence. Those courts generally have been unwilling to accept the premise of the decision below -- that the Government freely may confiscate property for use as evidence with no duty to provide compensation. Hence, although the regional courts of appeals often have concluded that they have no authority to address claims for damages,[17] courts that have addressed the claims on the merits have approved a damages remedy in this context. For example, the Tenth Circuit in *Lowther v. United States*, 480 F.2d 1031 (1973), affirmed an award of damages "to remedy a taking of property contrary to the Fifth Amendment" when the Government confiscated property that was "neither narcotics nor other contraband" and had been "determined by the trial court to have been innocently used and to have not been illegal per se." *Id.* at 1033. Similarly, the Ninth Circuit in *United States v. Martinson*, 809 F.2d 1364 (1987), held that a court has power to award damages to compensate for an unjustified seizure of property for evidentiary purposes. *Id.* at 1368-69.

Despite the different setting, there can be little doubt that those courts would reject the reasoning of the court below in a case properly before them. More fundamentally, the frequency with which those cases arise suggests that the government policy challenged by this petition is not at all uncommon. It well may be that most of those

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[17] *E.g.*, *Adeleke v. United States*, 355 F.3d 144 (2d Cir. 2004); *United States v. Bein*, 214 F.3d 408 (3d Cir. 2000); *United States v. Jones*, 225 F.3d 368, 469 (4th Cir. 2000); *Pena v. United States*, 157 F.3d 984 (5th Cir. 1998).

whose property is confiscated do not have the financial or logistical resources to pursue litigation through the Court of Federal Claims to the Federal Circuit and this Court. But "[t]he Fifth Amendment draws no distinction between grand larceny and petty larceny." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring). The common application of this policy to the impecunious in no way lessens the "'imperative that the Court maintain absolute fidelity to' the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally." *Kelo v. City of New London*, 545 U.S. 469, 507 (2005) (Thomas, J., dissenting).

CONCLUSION

Takings law often presents hard cases, in which weighty concerns are closely balanced. This case is not one of them. The decision ignores the text of the Clause, cannot be reconciled with its history, and rests on a fundamental misunderstanding of the most basic aspects of this Court's decisions interpreting the Clause.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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